BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ANTHONY M. HAVLIK Claimant	)	
VS.	)	
NEX TECH AEROSPACE Respondent	)	Docket No. 1,036,626
AND	)	
LIBERTY MUTUAL INS. CO. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the October 24, 2007, preliminary hearing Order entered by Administrative Law Judge John D. Clark. Dale V. Slape, of Wichita, Kansas, appeared for claimant. John Graham, of Overland Park, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant was injured out of and in the course of his employment with respondent on August 23, 2007, by aggravating a preexisting condition. Dr. Mark Dobyns was authorized as claimant's treating physician.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the October 23, 2007, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent asserts the ALJ exceeded his jurisdiction in granting the relief sought at the preliminary hearing as claimant's alleged accidental injuries did not arise out of and in the course of his employment with respondent. Respondent argues that claimant's testimony of a pop in his right knee on August 22, 2007, and a pain in his right knee while walking on uneven ground on August 23, 2007, was inconsistent with the medical evidence and that claimant's right knee problems were caused by an non-work-related left knee

problem. Respondent further argues that claimant's alleged injury of August 23, 2007, occurred after claimant had completed work and was clocked out. Respondent also contends that claimant's alleged injury resulted from a normal activity of day-to-day living and is not compensable under the Workers Compensation Act.

Claimant argues that the evidence is uncontroverted that he felt a pop in his right knee on August 22, 2007, while at work for respondent, and that the following day he was walking on respondent's premises when he stepped into a drop off or low spot, overextending his right knee. Accordingly, claimant requests the ALJ's Order of October 24, 2007, be affirmed.

The issue for the Board's review is: Did claimant suffer personal injury by accident that arose out of and in the course of his employment with respondent?

FINDINGS OF FACT

On August 22, 2007, claimant was working for respondent running a wheat starch paint stripper when he turned to his right and felt a pop in his right knee. He felt no pain and did not report the incident to respondent. The next day, August 23, he had clocked out of work and was walking between some buildings on respondent's premises when he stepped into a low spot on some uneven concrete and felt a sharp pain in his right knee. He went to the emergency room at Hutchinson Hospital.

Claimant's emergency room records revealed that he gave a history of no trauma to his right knee but said he had pain for three weeks. Those records also indicated that claimant said he had been treated for arthritis in his left knee and had been walking differently because of his left knee pain and his "right knee pain has increased."[1] The records further indicate that claimant stated he had a "[s]udden worsening this afternoon as [he] was leaving work [and] hasn't been able to walk on it since."[2] Claimant testified that he did not have pain in his right knee during the three-week period before August 23 and he did not tell the emergency room personnel that his right knee problems started three weeks earlier. He admitted he did not tell the emergency room personnel that he had been walking on uneven concrete when he felt the pain in his right knee or that he had felt a pop in his right knee on August 22.

Claimant was seen by Dr. Erik Severud for follow-up on August 24. The history set out in Dr. Severud's records reflects that claimant was primarily concerned that he had a new, right knee injury. Those records indicate that "[claimant] reports he has had some right knee pain for the past 3 weeks. He states he was just walking and his knee gave way

---

[1] P.H. Trans., Cl. Ex. 2 at 2.

[2] *Id.*

and [was] very painful. [Claimant] went to ER and was told he has arthritis."[3] Claimant said he did not remember telling Dr. Severud that he had been having right knee pain for the past three weeks.

Claimant was seen by Dr. Dobyns on August 29, 2007, at the request of respondent, to give an opinion as to whether claimant had a work-related injury. After the examination, he diagnosed claimant with a sprained knee and stated he suspected a meniscus tear, which he supposed was a compensable injury since the injury occurred on respondent's property while claimant was walking to his car.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[4] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[5]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[6]

K.S.A. 2006 Supp. 44-508(f) provides in pertinent part:

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or

---

[3] P.H. Trans., Cl. Ex. 1 at 1.

[4] K.S.A. 2006 Supp. 44-501(a).

[5] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

[6] *Id.* at 278.

> after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer.

K.S.A. 2006 Supp. 44-508(f) is a codification of the "going and coming" rule developed by courts in construing workers compensation acts. This is a legislative declaration that there is no causal relationship between an accidental injury and a worker's employment while the worker is on the way to assume the worker's duties or after leaving those duties, which are not proximately caused by the employer's negligence.[7] In *Thompson*,[8] the Kansas Supreme Court, while analyzing what risks were causally related to a worker's employment, wrote:

> The rationale for the "going and coming" rule is that while on the way to or from work the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment.

But K.S.A. 2006 Supp. 44-508(f) contains exceptions to the "going and coming" rule. First, the "going and coming" rule does not apply if the worker is injured on the employer's premises.[9] Another exception is when the worker is injured while using the only route available to or from work involving a special risk or hazard and the route is not used by the public, except dealing with the employer.[10]

K.S.A. 2006 Supp. 44-508(d) defines "accident" in part:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

---

[7] *Chapman v. Victory Sand & Stone Co.*, 197 Kan. 377, Syl. ¶ 1, 416 P.2d 754 (1966).

[8] *Thompson* v. *Law Offices of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

[9] *Thompson*, 256 Kan. 36, Syl. ¶ 1, where the court held that the term "premises" is narrowly construed to be an area controlled by the employer, 38-39. See also *Rinke v. Bank of America*, 282 Kan. 746, 148 P.3d 553 (2006).

[10] *Thompson*, 256 Kan. at 40.

K.S.A. 2006 Supp. 44-508(e) defines "personal injury" and "injury":

> "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

The Kansas Court of Appeals, in *Johnson*[11], held:

> In an appeal from the final order of the Workers Compensation Board awarding compensation for an injury suffered by an employee at the workplace, under the facts of this case substantial evidence did not support the board's finding that the employee's act of standing up from a chair to reach for something was not a normal activity of day-to-day living.

The court found it significant that "Johnson had a history of three or four [prior] incidents of left knee pain. Her treating physician, Dr. Jennifer Finley, testified that '[i]t looks like she had had years of degeneration and had some previous problems, and it was just a matter of time.'"[12]

In *Anderson*,[13] the Kansas Court of Appeals stated:

> Personal risks include those associated either with natural aging or normal day-to-day activity. Where an employment injury is clearly attributable to a personal condition of an employee, and no other factors intervene or operate to cause or contribute to the injury, no award is granted. But where an injury results from the concurrence of some preexisting personal condition and some hazard of employment, compensation is generally allowed.
>
> An injury arises out of employment if the injury is fairly traceable to the employment and comes from a hazard the worker would not have been equally exposed to apart from the employment.
>
> A manifestation of force is not necessary for an incident to be deemed an "accident" under K.S.A. 44-508(d).

---

[11] *Johnson v. Johnson County*, 36 Kan. App. 2d 786, Syl. ¶ 3,147 P.3d 1091, *rev. denied* 281 Kan. __ (2006).

[12] *Id.* at 788. See also *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

[13] *Anderson v. Scarlett Auto Interiors*, 31 Kan. App. 2d 5, Syl. ¶¶ 5, 6, 8, 61 P.3d 81 (2002).

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.[14] The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.[15]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[16] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[17]

ANALYSIS

The statutory definition of "injury" excludes disabilities that are shown to be the result of the natural aging process or the "normal activities of day-to-day living." The burden to show a disability is the result of the natural aging process or the normal activities of day-to-day living is upon the respondent.

Although walking can be described as a normal activity of day-to-day living, K.S.A. 44-2006 Supp. 508(e) does not exclude "accidents" that are the result of such activity, but rather excludes injuries where the "disability" is a result of the natural aging process or the normal activities of day-to-day living. In this sense, it is another way of excluding personal risks from coverage under the Workers Compensation Act.

The Board has long concluded that the exclusion of disabilities resulting from the normal activities of day-to-day living from the definition of injury was an intent by the Legislature to codify and strengthen the holding in *Boeckmann.*

Claimant has alleged that he suffered a specific traumatic injury on August 23, 2007, while walking on uneven ground. The court in *Boeckmann* distinguished from its holding those cases where "the injury was shown to be sufficiently related to a particular strain or

---

[14] See*, e.g., Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976); *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

[15] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, Syl. ¶ 3, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001).

[16] K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[17] K.S.A. 2006 Supp. 44-555c(k).

episode of physical exertion" to support a finding of compensability.[18] Similarly, the court in *Johnson* distinguished its holding from cases where the injury is "fairly traceable to the employment."[19] The Board concludes that the Legislature did not intend for the "normal activities of day-to-day living" to be so broadly defined as to exclude disabilities caused or aggravated by the strain or physical exertion of work. And because claimant was injured on respondent's premises, his accident is not barred by the so-called "going and coming" rule.

The only expert medical opinion on the causation issue is contained in Dr. Dobyns' report, which states that claimant's right knee injury occurred as claimant "was walking up to his car . . . on his company's property . . . ."[20] This is probably just a recitation of the history given to him by claimant rather than an independent causation opinion. Dr. Dobyns recommends claimant restrict his standing and walking as tolerated with no squatting or kneeling and a 15 pound lifting restriction.

Claimant relates his right knee injury to work. The only contrary evidence is the August 23, 2007, emergency room record that states the onset of claimant's right knee pain was "3 weeks ago" and "[patient] states no trauma."[21] Claimant denies saying this. Furthermore, the emergency room record goes on to state: "Today much worse" and "unable to walk today on right leg."[22] Claimant testified that he did not say he suffered an accident at the emergency room because he did not fall and so did not perceive what had happened to be an accident. He likewise explained that at that time he did not think his injury was compensable under workers compensation because it happened after he clocked out. The ALJ apparently found claimant to be a credible witness. Based on the record presented to date, this Board Member likewise finds it is more probable than not that claimant injured his right knee as he was leaving work on August 23, 2007, as alleged.

CONCLUSION

Claimant's accident arose out of and in the course of his employment with respondent. His accident and resulting injury are directly attributable to his work. Claimant was not injured because of a personal risk and is not disabled due to a personal condition as in *Boeckmann* or *Johnson*. Accordingly, his disability did not result from the normal activities of day-to-day living. Furthermore, as claimant's accident occurred on

---

[18] *Boeckmann*, 210 Kan. at 737.

[19] *Johnson*, 36 Kan. App. 2d at 789.

[20] P.H. Trans., Cl. Ex. 3 at 2.

[21] P.H. Trans., Cl. Ex. 2 at 2.

[22] *Id.*

respondent's premises, he was not coming or going for purposes of K.S.A. 2006 Supp. 44-508(f).

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge John D. Clark dated October 24, 2007, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January, 2008.

_____
HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Dale V. Slape, Attorney for Claimant
John Graham, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge